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Supreme Court, U.S.
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

TAYLOR MADE OFFICE SYSTEMS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

COMMUNICATIONS WORKERS OF AMERICA,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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6 cpies

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that when a union agent during a representation election campaign threatens deadly violence against persons who may cross the union's picket line in a future strike, such threats as a matter of law cannot be sufficient grounds to set aside the election result.

2. Whether Petitioner presented a prima facie case that a representation election was tainted by threats of violence by the Union's agent, thus entitling Petitioner to an evidentiary hearing on its objection to conduct affecting the election.

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INTRODUCTION

The Petitioner, Taylor Made Office Systems,[1] hereby prays that a Writ of Certiorari issue to review a Judgment of the Court of Appeals for the Ninth Circuit, entitled "*Taylor Made Office Systems v. National Labor Relations Board and Communications Workers of America, AFL-CIO*" (Case Nos. 87-7004 and 87-7038).

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[1]The caption of this case contains the names of all parties. Petitioner is a corporation having no parent company, subsidiary or affiliated company.

OPINIONS BELOW

On November 30, 1981, a Report on Objections was issued by the Acting Regional Director for Region 20 of the National Labor Relations Board, overruling Petitioner's objections to conduct affecting the representation election in this case (Appendix A). On June 17, 1982, a Decision and Certification of Representative was issued by the National Labor Relations Board, adopting the Acting Regional Director's Report (Appendix B). On July 31, 1986, a Decision and Order was issued by the National Labor Relations Board, granting the General Counsel's motion for summary judgment. The Decision and Order is reported at 280 NLRB No. 151 (Appendix C). On November 5, 1987, a Memorandum decision upholding the Board's Certification was issued by the Ninth Circuit Court of Appeals (Appendix D). An order granting rehearing was thereafter issued on April 25, 1988. On August 30, 1988, an Order was issued by the Ninth Circuit Court of Appeals affirming its original decision (Appendix E.).

JURISDICTION

The Court of Appeals had jurisdiction under 28 U.S.C. § 160(e) and (f). Under 28 U.S.C. § 1254, this Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari.

APPLICABLE STATUTES

Section 2(13) of the Labor-Management Relations Act (29 U.S.C § 152(13)) provides:

> "(13) In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling" (29 U.S.C. § 152(13)).

Section 7 of the Labor-Management Relations Act (29 U.S.C. § 157) provides:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively

through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Rule 102.69 of the Rules of the National Labor Relations Board (29 C.F.R. § 102.69) provides in pertinent part:

"(c)(1) If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, or if the challenged ballots are sufficient in number to affect the results of the election, the regional director shall, consistent with the provisions of § 102.69(d), initiate an investigation, as required, of such objections or challenges."

* * * * *

"(d) In issuing a report on objections or challenged ballots, or both, following proceedings under §§ 102.62(b) or 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under § 102.67, the regional director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing shall be conducted with respect to those objections or challenges which the regional director concludes raise substantial and material factual issues."

STATEMENT OF THE CASE

On September 23, 1981, a representation election was conducted by the National Labor Relations Board among Petitioner's employees, to determine whether or not a majority wished to be represented for collective bargaining by the Communications Workers of America ("Union"). The official Tally of Ballots cast at the election showed 29 votes for the Union, 25 votes for the

Employer; and two ballots challenged by the Union (E-3).[2] The challenge to those ballots has never been resolved, and they remain sealed and not yet counted.

Taylor Made thereafter filed Objections to Conduct Affecting Election Results (E-4). Objection #2, the only objection now at issue, asserted that the Union had unlawfully "coerced, threatened, and intimidated employees in order to influence their votes" (E-4). In support of its objection, Taylor Made submitted a sworn affidavit from Steve Burgess, an employee who had voted in the election (E-5). According to Burgess, he had attended a Union meeting two days before the election. The meeting had been called and organized by a Tayor Made employee organization which had been actively involved in the Union's campaign, and which had identified itself throughout the campaign as the "TMOS In-Plant Organizing Committee." According to Burgess, the Union's organizer, Frank Tanner, was also at the meeting. Burgess described the events as follows:

> "During the meeting, Tanner addressed the audience and said that he wanted to recognize the people on the union's In-Plant Committee at Taylor Made, because they were the ones who were really responsible for contacting the union and organizing employees for the union. He then called out the names of six employees, and as each name was called, the employee stood and received some applause. To the best of my recollection, the following people were recognized in that manner: Greg Someson, Anthony Siller, Lee Pritchard, Matthew Cook, Patty Beltrame and Ray Bass. All those people are personally known to me as employees at Taylor Made.
>
> "I have known Ray Bass for some time at work, so at a break in the meeting I sought him out to ask a question that had been bothering me. I asked Bass what would happen if the union and the company could not agree on a contract, and the union then called a strike and the company replaced

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[2]The record before the Court of Appeals contains 25 Exhibits, designated E-1 through E-25. References in this Petition to those Exhibits use the same designation.

employees who went out on strike. Bass replied, 'that's when the shotguns come out.' I was surprised at that statement and said something like, 'are you serious? Would it really go that far? Would that really happen?' Bass replied that he didn't think that Barry would let it go that far, but if it did, 'that's when the shotguns come out.' His reference to 'Barry' was Barry Taylor, the owner of Taylor Made. Bass' statements to me were made in a serious manner, and not in a joking way. To the best of my recollection, no one overheard our conversation.

"I have known Ray Bass for almost two years and know that he is an avid gun collector. I have not seen his collection, but he has talked about it to me many times, and I have heard other employees talk about it. I also know that he goes shooting a lot, and has taken other employees with him. He has invited me to go shooting with him, but I have not been able to go" (E-5).

Also submitted in support of the Employer's Objection were five campaign flyers that had been distributed by the Union's In-Plant Committee to all employees during the election campaign. Those flyers clearly showed that the In-Plant Committee was, by its own admission and by the Union's admission, acting as the agent and in-plant organizing arm of the Union. The first document was titled "In-Plant Committee Report #1 . . . TMOS Organizing Campaign," dated 8/31/81 (E-6). In that Report, the Committee told employees that it had compiled a list of key issues concerning wages, benefits and working conditions, which the Committee had gleaned from a questionnaire sent to employees by the Union. The Union's instruction to employees on the questionnaire was to send the completed questionnaires directly to the In-Plant Committee. The address given for the Committee was, in fact, the Union's own address (E-6, 4th page).

The second document was titled "In-Plant Committee Report #3," dated 9/10/81 (E-7). In that Report, the In-Plant Committee discussed wage issues, based on a summary of employee responses to the Union's "Wage Questionnaire," and on wage data supplied by the Union to the Committee showing wage rates in the Union's contract with Pacific Telephone Company.

The third document was titled "In-Plant Committee Report #4," dated 9/12/81 (E-8). In that Report, the In-Plant Committee gave its analysis of employee responses to the "Issues Questionnaire," and enclosed a chart purporting to compare benefits at Taylor Made with benefits at three companies under contract with the Union. Admittedly, that data was supplied by the Union to its In-Plant Committee.

The fourth document was a letter from Frank Tanner, the Union's organizer, to Taylor Made employees, dated 9/15/81 (E- 9). In that letter, Tanner specifically recognized the In-Plant Committee as the Union's agent by stating that "in the time remaining before the election, both myself and your TMOS In-Plant Committee will address those other areas in which Barry Taylor has chosen to publish misinformation" (E-9, p.2).

The fifth document submitted in support of the Employer's Objection was titled "A Message From the In-Plant Committee," dated September 21, 1981 (E-10). In that document, the In-Plant Committee took credit for doing the Union's work, referring to "our organizing effort," stating that "we have defined the issues," and even declaring that "we petitioned the NLRB to hold a Representation Election at TMOS." In short, the letter clearly defines the goals and efforts of the Union and its In-Plant Committee as one and the same.

A sixth document submitted in support of the Employer's Objection[3] was a newsletter published and distributed to employees by the In-Plant Committee, in which the Committee further demonstrated that it was the Union's agent at the plant (E-13). For example, the Newsletter was replete with such phrases as "*our* decision to organize and bargain for a contract . . . we seek a voice in establishing policies . . . those things are our goals in bargaining . . . we must make final preparations to begin bargaining, the date of that meeting will be put out with ample notice. Plan to attend . . . " etc.

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[3] Submitted at a later time, on December 24, 1981, but while the Objection was still pending without decision.

In short, Taylor Made submitted substantial evidence in support of its objection, showing that (1) the In-Plant Committee was the agent and mouthpiece of the Union at Taylor Made, (2) that Ray Bass was a member of the Committee and was expressly recognized and applauded as such by the Union at the meeting on September 21, and (3) that Bass made a clearly unlawful and coercive threat to employee Burgess when Burgess sought him out solely because of his announced connection with the In-Plant Committee. Despite this evidence, the Region issued its Report on Objections, dated 11/30/81, overruling Taylor Made's objections and refusing to conduct a hearing (Appendix A). According to the Report, "although the speaker had earlier been identified as being on the employee organizing committee, this is insufficient evidence to make him an agent of the [Union] or to bind the [Union] by his statements. I therefore recommend that objection No. 2 be overruled" (Appendix A, p. 3).

Taylor Made filed exceptions to the Report, arguing that it had submitted enough evidence to establish a prima facie case of agency and misconduct, and that the Region had improperly refused to conduct an evidentiary hearing. On June 17, 1982, a three-man panel of the NLRB issued its Decision and Certification of Representative, rejecting the Employer's plea for a hearing and certifying the Union as the collective bargaining agent (Appendix B). That Decision, however, was split. The Chairman of the NLRB, who was a member of the panel, stated in dissent:

> "Chairman Van de Water finds, contrary to his colleagues, that the assertions of the Employer, if sustained at a hearing, would appear to establish a prima facie case of agency. Accordingly, he would direct a hearing to resolve that issue, and the questions of whether the alleged objectionable statement was, in fact, made, and, if so, the effect it would have upon the election results" (Appendix B, note 3).

Thereafter, the Employer advised the Union and the Board that it would refuse to bargain because the Union's Certification was invalid in light of the Board's improper refusal to conduct a hearing on the Employer's Objection (E-16). The Union then filed a refusal to bargain charge, and a Complaint subsequently issued (E-17 through E-20). A Motion for Summary Judgment

was then filed by the General Counsel (E-21). After an inordinate and unexplainable delay of 3½ years, the Board rendered its Decision and Order granting the Motion for Summary Judgment (Appendix C).

Taylor Made then submitted a Petition for Review to the Ninth Circuit Court of Appeals, and the Board filed a Cross Application for Enforcement. In its Petition for Review, Taylor Made argued that it had established a prima facie case of unlawful threats of violence and gun play,[4] that such threats were made by an agent of the Union, that the NLRB abused its discretion in refusing to conduct an evidentiary hearing, and that the Certification issued to the Union was therefore invalid.

The central issue before the Court of Appeals and before the Board was whether Taylor Made had established a prima facie case that the person who made the threats of violence and gunplay was an agent of the Union. However, the Court of Appeals did not decide that issue, but instead chose to base its decision on a discredited legal theory that had not at any time been urged by the Board or by the Union in this case. According to the Court of Appeals, the threats could not, as a matter of law, be considered coercive because they were directed to events in a potential future strike rather than to the election itself:

> "Bass' statements are not coercive conduct. Any threat they contain is directed at either management or strikebreakers, not at voters in the election. Because Taylor Made has not made out a prima facie case of coercive conduct, the Board did not abuse its discretion in failing to hold an evidentiary hearing.
>
> Because no coercive conduct was present in this case, we need not determine whether Bass was acting as an agent of the Union" (Appendix D, last page).

Taylor Made then petitioned for rehearing, on the grounds that the Court of Appeals decision was directly contrary to authoritative decisions in at least three other Circuits, directly contrary to

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[4] The threats of Bass, as described by Burgess, were not denied at any stage in these proceedings.

authoritative decisions from the same Circuit, and directly contrary to the position of the Board itself on this issue. After rehearing, the Court of Appeals reaffirmed its original decision without further comment (Appendix E).[5] It is from the original Memorandum decision and subsequent affirming Order of the Court of Appeals that this review is sought.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Decision in This Case Directly Conflicts With Decisions of Other Circuits.

Under Rule 17 of this Court, review on a writ of certiorari is appropriate where the decision to be reviewed is in conflict with decisions of another federal court of appeals on the same issue. The decision here sought to be reviewed meets that criteria.

The Court of Appeals decision concludes, without benefit of any discussion or citation of authority, that pre-election threats of deadly violence by the Union's agent cannot, as a matter of law, be sufficient grounds to set aside a representation election, because the threat was "directed either at management or strikebreakers, not at voters in the election" (Appendix D). That holding directly conflicts with decisions of the Third, Fifth and Sixth Circuits; it is contrary to the rule followed by the Board; it is contrary to the rule of the Ninth Circuit itself; and it is manifestly contrary to logic and common sense.

In *Hickory Springs Mfg. Co. v. NLRB* (5th Cir. 1981) 645 F.2d 506, a union agent had stated in a pre-election campaign that if there were a strike in the future and anyone crossed the picket

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[5] Upon rehearing, however, a dissenting opinion was rendered by Presiding Judge Arthur L. Alarcon. According to Judge Alarcon, the majority erred in holding that union threats of violence directed at future "strikebreakers" cannot, as a matter of law, be sufficient grounds to set aside a representation election. Judge Alarcon further concluded that Taylor Made had established a prima facie case that the election was tainted by unlawful threats of violence by a Union agent, and that the Board abused its discretion in refusing to conduct an evidentiary hearing (See dissenting opinion at Appendix E).

line, they should be "taken out and the dogshit beat out of them," and that anyone who crossed such a picket line would "get it" (at 509). The Fifth Circuit rejected the argument that such threats do not have sufficiently coercive impact on the election process because they refer to violence in a future strike, characterizing that view as "myopic and far too narrow" (at 509):

> "To [adopt such a view] would be to issue a free license to union officials and organizers . . . to make whatever threats they wish of burnings, beatings, and suchlike to come so long as they do not relate them specifically to the campaign or election. This we decline to permit the Board to do, for such a course of action flies in the face of human experience. Men judge what others will do on given occasions by their prior actions and, less reliably, doubtless, by their statements about their intended future actions. So they assess what kind of folk they are dealing with and how those folk are likely to react if crossed. Even the implicit threat of a club or pistol on the hip, without more, may be sufficient to influence significantly the conduct of those who are cast in company with the bearer. In short, we reject the view that such pervasive threats of violence as these can be said, in effect as a matter of law, not to have created a coercive atmosphere sufficient to contaminate the election because they were merely conditional ones" (at 510).

In *Loose Leaf Hardware, Inc. v. National Labor Relations Board* (6th Cir. 1981) 666 F.2d 1036, a union agent had made pointed comments to employees during an election campaign, concerning "accidents" that had befallen people who had crossed the union's picket line in another case. The Board had refused to conduct a hearing on the employer's objection, and had certified the union. The Sixth Circuit refused to enforce the Board's order to bargain, remanding the case for an evidentiary hearing:

> ". . . [T]he Court is of the opinion that it was error for the Board to have denied the Petitioner a hearing on its first two objections to the election, given the nature and seriousness of the charges" (at page 1036, citing the Fifth Circuit decision in *Hickory Springs Mfg. Co., supra.*)

Similarly, in *NRLB v. L&J Equipment Co., Inc.* (3rd Cir. 1984) 745 F.2d 224, the employer had objected to numerous incidents and threats of violence attributable to a union during an election campaign. Prominent among the incidents complained of were several threats made to employees about possible violence in the event of a strike, including a threat to an employee that his legs would be broken if he were to cross the union's picket line. The Board had refused to conduct an evidentiary hearing, and had certified the union. The Third Circuit refused to enforce the Board's order to bargain, remanding the case for an evidentiary hearing to determine the coercive effect on the election process (esp. page 238).

Moreover, the Court of Appeals decision in this case is directly contrary to existing authoritative decisions of the same Circuit.[6] In *NLRB v. Advanced Systems, Inc.* (9th Cir. 1982) 681 F.2d 570, the employer had made several objections to a union's pre-election conduct, including threats by a union agent to "beat up strikebreakers" (at 577). The Board had refused to conduct a hearing on the objections and had certified the union. The Ninth Circuit refused to enforce the Board's order, rejected the argument that the threats were insufficient to set aside the election because they referred to violence in a future strike rather than the election itself, and remanded the case for an evidentiary hearing:

> ". . . [T]he Company's exceptions raise substantial and material allegations of threats and vandalism that would, if true, require the election to be set aside" (at 575).
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> Without seeing the evidence that was before the Regional Director, we cannot determine if there are material disputes about how many times Brooks threatened to beat up strikebreakers, whether the employees feared Union reprisals, and

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[6] Although a conflict between panels of the same Circuit may not be enough by itself to support a request for a writ of certiorari, it is a factor favoring issuance of the writ where there is also a conflict between the Circuits (see *Cleveland Board of Education v. LaFleur* (1974) 414 U.S. 632, 638-639; and *Lau v. Nichols* (1974) 414 U.S. 563, 565).

other critical facts. Viewed in the light most favorable to the Company, however, the exceptions make a prima facie showing that threats and violence prevented a free election" (at 577).

In short, the Circuit Courts in all the above decisions held that pre-election threats of violence in a future strike are sufficient grounds to set aside an election. The Court of Appeals decision in this case is directly contrary to those decisions, and a writ of certiorari should issue to resolve the conflict.

B. The Court of Appeals Decision in This Case Also Directly Conflicts With the Ruling Authority of the National Labor Relations Board.

The great anomaly in this case is that the Court of Appeals has upheld the Board's action on a legal theory not asserted by the Board or by the Union, and which is directly contrary to the Board's own ruling authority.[7] As intimated in the Court of Appeals decisions cited above, the Board at one time (1978-1983) did hold the view that pre-election threats of violence in a future strike cannot be sufficient grounds to set aside an election, on the theory that such threats are supposedly related only to possible future events and not to the election itself. However, faced with the unrealistic nature of that view and with consistent judicial unwillingness to go along, the Board reversed its position in *Scioscia dba Home and Industrial Disposal Service,* 1983-84 CCH NLRB par. 15, 610. In that case, a union agent had made pre-election threats of violence in a future strike, threatening that anyone who "helped" the employer would be "made an example," and further stating that an employee for another company who had "worked both sides of the fence" in a strike was "still in the hospital" (at page 26,648). The Board held that such threats

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[7]There is nothing unusual, of course, in a Court of Appeals refusing to enforce a Board order because it disagrees with the Board's legal position. However, Petitioner has been unable to find any case where a Court of Appeals *upheld* a Board order on a ground not urged by the Board, and which was directly contrary to "Board law." This case appears to be entirely unique in that respect.

are sufficient to set aside an election, and ordered an evidentiary hearing:

> "... we believe it unrealistic to conclude that a union agent's threats of bodily harm, damage to personal property, or the like, cannot, as a matter of law, impact on an election merely because the threat in question is couched in terms of possible future conduct. Such an approach does not take into account the tendency of such threats to have a substantial and destructive effect on free and open campaign discussion, as well as freedom of choice at the polling place itself. A campaign environment in which a union threatens that violent repercussions will ensue, should employees choose to oppose it in the future, is one in which there is substantial likelihood that employees will be inhibited from expressing their actual views, and is surely one which jeopardizes the integrity of the election process.
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> * * * * *
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> We cannot conclude, as a matter of law, that if the threats alleged herein were made, the tenor, effect, and contingent nature of which were similar to those in *Hickory Springs*, they were so remote as to have had no effect on the election. To the contrary, we find that the allegations in Objection 1 pertaining to union threats of violent reprisals for refusing to cooperate with the Petitioner during a strike, if found to be true, constitute grounds for setting aside the election.... Inherent in statements such as these is the simple, unambiguous message that opposing the Union could be a very dangerous course for employees to pursue. If made, these statements would have destroyed the conditions for a free and fair election" (at page 26,649).

In short, the Court of Appeals decision in this case is nothing less than an aberration, an inexplicable reversion to a long discredited view rejected by the courts and by the Board itself. Petitioner urges this Court to correct that error.

C. The Court of Appeals Decision Sought to be Reviewed Presents an Important Question of Federal Law That Requires Uniformity Among the Circuits and Should Therefore be Settled by This Court.

There is nothing in the Labor-Management Relations Act more fundamental to federal labor policy than the system of representation elections, whereby employees can freely choose whether or not they wish to be represented by a union. Indeed, the federal rights of employees guaranteed under Section 7 of the Act — the right to organize, join and assist labor organizations, to bargain collectively through chosen representatives, or to refrain from any such activity — could not be realized without the representation election process established by the Act. Given the fundamental importance of that system, it is critical that the integrity of the system be preserved so that employees can exercise their right to choose in a "laboratory" atmosphere free of coercion, intimidation and threats to life and limb (see *NLRB v. ARA Services, Inc.* (3d Cir. 1982) 93 Labor Cases par. 13,449, page 20,627-28, discussing the Board's obligation to ensure that elections are conducted "under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees"). It would be a mockery of the law to permit the integrity of the election process to be compromised by allowing union agents to threaten shotgun attacks on people who choose to cross a picket line, merely because the threat is directed to future events rather than to the election itself. There is simply no reason to countenance any such threats, regardless of when they are to be carried out. As pointed out by the Fifth Circuit in *Hickory Springs, supra*, the view of the Court of Appeals in this case would give free license to union organizers to make whatever threats they wish of violence and deadly force, so long as the threats are not specifically related to the election itself. There is no reason in logic or federal labor policy to allow such license.

Moreover, it is obvious that the matter of pre-election threats of strike violence is not something unique to this case which cannot be expected to recur. On the contrary, it is to be expected that in virtually every representation election campaign, employers will inform employees about the possible consequences of

strikes that may be called by the union if it is elected. If unions are permitted to respond to such information with threats of violence and deadly force against those who would cross a picket line, the simple fact is that such threats will frequently be made. Again, there is no reason to allow the election process to be perverted in that manner.

In sum, it is clear that the effect of pre-election threats of future strike violence involves an important question of federal labor law and policy, and that uniformity is required among the Circuits as to what will be permitted and what will not be permitted in representation election campaigns.

D. Taylor Made Established a Prima Facie Case of Unlawful Conduct Adversely Affecting the Representation Election, and is Therefore Entitled to an Evidentiary Hearing on Its Objection.

Inasmuch as the Court of Appeals decision was based on a very narrow holding, this Court could reverse that holding and remand the case to the Court of Appeals to decide all other issues. However, should this Court decide that judicial economy favors a decision on all issues that were before the Court of Appeals, Petitioner offers the following summary of reasons why it is entitled to an evidentiary hearing.

First, the rule is clear that threats of violence are deemed inherently intimidating, and coercive effect is therefore presumed. In that circumstance, "proof that particular votes were changed is not required in challenging an election based on coercive behavior" (*NLRB v. Van Gorp Corp.* (8th Cir. 1980) 615 F.2d 759, 764; *Spring City Knitting Co. v. NLRB* (9th Cir. 1981) 647 F.2d 1011, 1019; see also the dissenting opinion of Judge Alarcon below, Appendix E).

Second, the Court of Appeals assumption that the Union agent's threats were "directed at . . . strikebreakers, not at voters in the election" (Appendix D) is drawn from thin air. Since essentially half of the employees in this matter voted against the Union, it can only be presumed that if the Union called a strike, a substantial number of the employee voters would not support the

strike and would elect to cross the Union's picket line, thereby becoming "strike-breakers" subject to Bass' threats of violence. In short, it is illogical to conclude that employee voters and future "strike-breakers" are mutually exclusive, and that voters will be unaffected by threats of physical violence and gun play against those who elect to cross a picket line. On the contrary, the threat of violence to "strike-breakers" is of obvious importance to every employee voter, because each one faces the prospect of violence should they elect to cross a picket line. That being so, the threats were clearly directed to voters and were coercive.

Third, although the threats in this case were heard by only one employee voter, those threats are sufficient reason to set aside the election because a change in only one vote could have reversed the outcome. The votes were 29 for the Union, 25 for the Employer, and 2 uncounted votes challenged by the Union. Therefore, if only one Union voter had voted the other way, the count would have been 28-26, and the challenged votes could have been determinative. Since both challenges were by the Union, it is likely that those votes were Company votes,[8] which would put the final count at 28-28, resulting in a victory for the Employer. In considering whether an objecting party has made out a prima facie case, the closeness of the vote is a vital factor that must always be considered *(NLRB v. Urban Telephone Corporation* (7th Cir. 1974) 499 F.2d 239, 244; *NLRB v. Van Gorp Corp.* (8th Cir. 1980) 615 F.2d 759, 766 (conduct in the election "must be evaluated in light of the closeness of the outcome"); *NLRB v. ARA Services, Inc.* (3rd Cir. 1982) 93 Labor Cases par. 13,449, page 20,633 (in a close election "even minor misconduct cannot be summarily excused on the ground that it could not have affected the election," and the fact that a change of one vote could have altered the outcome was crucial to the Court's conclusion that a hearing was improperly denied); and *Cross Baking Co. v. NLRB* (1st Cir. 1971) 78 LRRM 3059, 3061 (when a change in one vote could have reversed the outcome, it is error for the Board not to consider this factor); *NLRB v. L&J*

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[8]Unlike the employer, a union is free to ask individual employees how they intend to vote, and it is unreasonable to suppose that the Union would have challenged favorable voters.

Equipment Co., Inc. (3rd Cir. 1984) 745 F.2d 224, 238 (the fact that the election "turned on only a handful votes" was a critical factor); and *NLRB v. Bristol Spring Mfg. Co.* (2d Cir. 1978) 579 F.2d 704, 707 (holding that "the need for a hearing is particularly acute when, as here, an election is close"). In spite of Petitioner's urging of this point at every stage in this case, this factor was ignored by the Board and by the Court of Appeals.

Fourth, the evidence submitted by Petitioner clearly established a prima facie case of agency, such that Bass' threats of deadly violence are attributable to the Union. The undisputed evidence showed that Bass was a member of the Union's in-plant organizing committee, that both the Union and the Committee held out the Committee as the Union's representative and organizing force at the plant, that Bass was specifically recognized and applauded by the Union at a Union meeting two days before the election, and that Bass was sought out by Burgess specifically because Bass had been so recognized and was therefore presumed to speak for the Union. In such circumstances, the cases are legion that threats by in-plant committee members are attributable to the union (see *NLRB v. Georgetown Dress Corp.* (4th Cir. 1976) 79 Labor Cases par. 11,519, page 21,262 (under Section 2(13) of the Act, the principles of agency are to be liberally construed, and unions are chargeable for the misdeeds of in-plant committee members on the principle of apparent authority); *NLRB v. L&J Equipment Co., Inc.* (3rd Cir. 1984) 745 F.2d 224, 238, note 24 (recognizing the agency status of in-plant organizing committee members); *NLRB v. Urban Telephone Corporation* (7th Cir. 1974) 499 F.2d 239, 243-44 (principles of agency are to be liberally construed, union held responsible for coercive threats of employee who was used as the union's in-plant "contact" man); and *NLRB v. Advanced Systems, Inc.* (9th Cir. 1982) 681 F.2d 570, 576 (threats by employee member of in-plant committee attributable to union on basis of implied or apparent authority).

Finally, the law is clear that where a prima facie case is established by an objecting party, it is an abuse of discretion for the Board to deny an evidentiary hearing (*NLRB v. Masonic Homes of California* (9th Cir. 1980) 624 F.2d 88, 89 and 91 (no

discretion to deny a hearing where prima facie case established); *May Dept. Stores Co. v. NLRB* (9th Cir. 1983) 707 F.2d 430, 434 (no discretion to resolve agency issue without a hearing); *NRLB v. West Coast Liquidators, Inc.* (9th Cir. 1984) 725 F.2d 532, 536 (no discretion to deny hearing on agency issue where employer submitted evidence that the union recognized and applauded the efforts of an in-plant organizing committee); *Hickory Springs Mfg. Co. v. NLRB* (5th Cir. 1981) 645 F.2d 506, 508 (where objecting party makes out a prima facie case, Board cannot weigh contrary evidence or make credibility determinations, but must conduct a hearing); *NLRB v. ARA Services, Inc.* (3rd Cir. 1982) 93 Labor Cases par. 13,449, page 20,628 (same); and *NLRB v. Belcor, Inc.* (9th Cir. 1981) 652 F.2d 856, 859 (well pleaded factual assertions of the objecting party must be construed most favorably to the objecting party, and a hearing is required "if those factual assertions create a material issue of fact." Factual disputes cannot be resolved by the Board *ex parte* without a hearing).

In sum, Petitioner submitted evidence plainly sufficient to establish a prima facie case of unlawful conduct affecting the election, and it was an abuse of discretion for the Board to deny a hearing.

CONCLUSION

The decision of the Court of Appeals in this case is an aberration that cannot be permitted to stand. Petitioner submitted evidence clearly sufficient to establish a prima facie case of unlawful conduct, and the Board abused its discretion in denying a hearing. Instead of correcting that abuse, the Court of Appeals upheld the Board on the basis of a discredited legal theory long rejected by other Circuits and by the Board itself. Petitioner urges this Court to correct the error through writ of certiorari.

Dated: November 23, 1988

HOLMES, ROCHESTER & LEA

BY _____

Paul B. Johnson

Attorneys for Petitioner

APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD[1]

REGION 20

TAYLOR MADE OFFICE SYSTEMS, INC.

Employer

and **Case No. 20-RC-15367**

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 9410, AFL-CIO

Petitioner

REPORT ON OBJECTIONS

Pursuant to a Stipulation for Certification Upon Consent Election, approved September 1, 1981,[2] an election by secret Ballot was conducted on September 23 in a unit of all full-time

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[1]Hereinafter referred to as the Board.

[2]All dates herein are in calendar year 1981, unless otherwise specified.

and regular part-time service technicians including technical specialists, technical representatives, trainees and apprentices, dispatchers, vehicle maintenance employees, shop technicians, trainees and parts employees, employed by the Employer at its facilities in Concord, Burlingame, Oakland, San Francisco, San Jose, San Rafael and Rohnert Park, California, and Los Vegas, Nevada locations, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act, as amended. The Tally of Ballots served on the parties at the conclusion of the election showed that of approximately 61 eligible voters, 29 cast ballots for and 25 cast ballots against Petitioner. There were 2 challenged ballots which were not determinative of the results of the election.

Timely objections were filed by the Employer on September 28, a copy of which

was served on the Petitioner.

The objections state:

> (1) The Union made deliberate and material misrepresentations of fact at the time and in such a manner that the Employer could not make an effective reply.
> (2) The Union, coerced, threatened, and intimidated employees in order to influence their votes.
> (3) The Union violated Section 8(b)(1)(A) of the National Labor Relations Act.

Objection No. 1 This objection alleges material misrepresentations by the Union at a time which prevented an effective reply by the Employer.

This objection is based on a flyer[3] distributed by the Petitioner at a meeting on September 21, 1981. In particular, the Employer objects to that portion of the flyer which states:

> "...guarantee you a company vehicle and allow you to learn through the 'grapevine' that there is a cost involved, then unilaterally impose a higher cost! Can you do more than

---

[3]Attached hereto as Exhibit 1

> laugh at that insult to your intelligence called Tech-Plus?"

The Employer states that this statement is a misrepresentation because its service employees are provided a company vehicle for personal use under certain specified conditions.

In considering the impact of alleged misrepresentations on its elections, the Board in General Knit of California, Inc., 239 NLRB 619, 620 (1978) returned to the standard previously set forth in Hollywood Ceramics Company, Inc., 140 NLRB 221 (1962). In that case the Board stated that it would set elections aside only where there had been misrepresentation or other similar campaign trickery involving a substantial departure from the truth at a time which prevents the other party from making an effective reply, so that the misrepresentation may be expected to have a significant impact on the election. In

evaluating objections to conduct affecting the outcome of elections, the Board, however, has consistently recognized that employees are mature adults, capable of recognizing and evaluating campaign rhetoric for what it is. The Board has also carefully considered the question of whether the statements alleged as misrepresentations are within special knowledge of the party making them.

In evaluating the instant case, I note that the alleged misrepresentation concerned a matter about which employees have direct knowledge since some of them use the company vehicles which are the subject of the statement. Thus, the alleged misrepresentation is not one concerning facts within the special knowledge of the Petitioner only, but one about which employees also have independent knowledge.

In carefully considering the context

of the alleged misrepresentations, I have concluded that it is capable of evaluation by employees and of minimal significance to the election. Accordingly, I recommend that Objection No. 1 be overruled.

Objection No. 2 This objection alleges coercion, threats and intimidation by the Petitioner against the employees to influence their vote. The evidence presented in support of this objection disclosed that the Petitioner conducted a meeting of employees on or about September 21, 1981. During a break in the meeting one employee asked another what would happen if the Petitioner called a strike and the company replaced the strikers. The second employee is alleged to have responded, "That's when the shotguns come out."

Assuming that this statement was in fact made, no evidence was presented that there were other employee witnesses

present. Moreover, although the speaker had earlier been identified as being on the employee organizing committee, this is insufficient evidence to make him an agent of the Petitioner or to bind the Petitioner by his statements. I therefore recommend that Objection No. 2 be overruled.

Objection No. 3 No evidence was presented in support of this objection in addition to that discussed above. I therefore recommend that it be overruled.

SUMMARY

It is recommended that the Employer's objections be overruled in their entirety and that an appropriate certification issue.

DATED AT San Francisco, California, this 30th day of November, 1981.[4]

/s/
Robert H. Miller, Acting Regional Director
National Labor Relations Board
Region 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102

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[4]Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by December 14, 1981. Under the provisions of Section 102.69(g) of the Board's rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TAYLOR MADE OFFICE SYSTEMS, INC.

Employer

and

Case No. 20-RC-15367

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 9410, AFL-CIO

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held on September 23, 1981,[1] and

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[1]The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 29 for, and 25 against, the Petitioner; there were 2 challenged ballots, an insufficient

the Acting Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions[2] and brief, and hereby adopts the Acting Regional Director's findings and recommendations.[3]

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number to affect the results.

[2]The exceptions of the Employer, in our opinion, raise no material or substantial issues of fact or law which would warrant reversal of the Acting Regional Director's findings and recommendations, or which would warrant a hearing.

[3]The Acting Regional Director recommended that Objection 2 be overruled because there was insufficient evidence that the employee, who allegedly made an objectionable statement, was an agent of the Union. We agree that there is not sufficient evidence to prove agency. However, we overrule this objection not because of this finding alone, but also because the conduct alleged was not so aggravated as to create a general atmosphere of fear and reprisal rendering a free expression of choice of representative impossible. See Hamilton Label Services, Inc., 243 NLRB 598 (1979).

With regard to Objection 2, Chairman Van de Water finds, contrary to his colleagues, that the assertions of the Employer, if sustained at a hearing, would appear to establish a prima facie case of

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Communications Workers of America, Local 9410, AFL-CIO and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate

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agency. Accordingly, he would direct a hearing to resolve that issue, and the questions of whether the alleged objectionable statement was, in fact, made, and, if so, the effect it would have upon the election results.

As for Objection 1, the Acting Regional Director recommended that it be overruled under the standards of Hollywood Ceramics Company, Inc., 140 NLRB 221 (1962), reaffirmed in General Knit of California, 239 NLRB 619 (1978). Chairman Van de Water agrees that said objections should be overruled, but concludes that it is without merit under either the standards of Shopping Kart Food Market, Inc., 228 NLRB 1311 (1977), or the standards of Hollywood Ceramics Company, Inc.

In the absence of exceptions, we adopt, pro forma, the Acting Regional Director's recommendation that Objection 3 be overruled.

unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time and regular part-time Service Technicians including Technical Specialists, Technical Representative, Trainees and Apprentices; Dispatchers; Vehicle Maintenance employees; Shop Technicians, Trainees and Parts employees; all as employed by the Employer at its facilities in Concord, Burlingame, Oakland, San Francisco, San Jose, San Rafael and Rohnert Park, California and Las Vegas, Nevada locations excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., June 17, 1982.

_____
John R. Van de Water,
Chairman

_____
John H. Fanning,
Member

_____
Howard Jenkins, Jr.,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TAYLOR MADE OFFICE SYSTEMS, INC.

and

Case No. 20--CA--17656

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 9410, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

DECISION AND ORDER

Upon a charge filed by the Union 20 January 1983, the General Counsel of the National Labor Relations Board issued a complaint 18 February 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 17 June 1982, following a Board election in Case 20--RC--15367, the Union was certified as the exclusive collective-bargaining

representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); Frontier Hotel, 265 NLRB 343 (1982).) The complaint further alleges that since 23 July 1982 the Company has refused to bargain with the Union. On 28 February 1983 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 25 April 1983 the General Counsel filed a Motion for Summary Judgment. On 2 May 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board

has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint the Company admits its refusal to bargain but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.[1] The General Counsel argues that all material issues have been decided previously. We agree with the General

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[1]The Company denies the complaint allegation that the charge was filed by the Union on 20 January 1983 and a copy of the charge was served by certified mail on the Company on 24 January 1983. The record supports the complaint allegation. The Company also denies the complaint allegations that it meets the Board's discretionary jurisdictional standard for nonretail operations, that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, that the Union is a labor organization within the meaning of Sec. 2(5) of the Act, and that the employee unit described below constitutes an appropriate unit. The Company did not contest these issues in the representation proceeding.

Counsel.

The record, including the record in Case 20--RC--15367, reveals that an election was held 23 September 1981 pursuant to a Stipulated Election Agreement. The tally of ballots shows that of approximately 61 eligible voters, 29 cast valid ballots for and 25 against the Union; there were 2 nondeterminative challenged ballots. After conducting an investigation of the Company's election objections, the Acting Regional Director for Region 20 issued his report on 30 November 1981 recommending that the objections be overruled. The Company filed exceptions, and on 17 June 1982 the Board in an unpublished decision adopted the Acting Regional Director's recommendations and certified the Union.

By letters dated 25 June 1982 and 13 January 1983, the Union requested the Company to bargain about terms and

conditions of employment for the unit employees. By letter dated 23 July 1982, the Company stated "this is to advise you that Taylor Made will not bargain with the union at this time."

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See Pittsburgh Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously

unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding.[2] Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Company, a California corporation, with a principal office and place of business in Concord, California, is engaged in the sale and repair of office equipment. During the calendar year preceding issuance of the complaint

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[2]No current Board Member participated in the decision in the representation proceeding.

the Company purchased and received directly from points outside the State of California goods valued in excess of $50,000. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held 23 September 1981 the Union was certified 17 June 1982 as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time Service Technicians including Technial Specialists, Technical Representative, Trainees and Apprentices; Dispatchers; Vehicle Maintenance employees; Shop Technicians, Trainees and Parts employees; all as employed by the Employer at its facilities in Concord, Burlingame, Oakland, San Francisco, San Jose, San Rafael and

Rohnert Park, California and Las Vegas, Nevada locations excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since 25 June 1982 the Union has requested the Company to bargain, and since 23 July 1982 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after 23 July 1982 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and

Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning with the date the Respondent begins to bargain in good faith with the Union. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962) enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir.

1965).

ORDER

The National Labor Relations Board orders that the Respondent, Taylor Made Office Systems, Inc., Concord, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Communications Workers of America, Local 9410, Communications Workers of America, AFL--CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the

Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time Service Technicians including Technical Specialists, Technical Representative, Trainees and Apprentices; Dispatchers; Vehicle Maintenance employees; Shop Technicians, Trainees and Parts employees; all as employed by the Employer at its facilities in Concord, Burlingame, Oakland, San Francisco, San Jose, San Rafael and Rohnert Park, California and Las Vegas, Nevada locations excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Post at its facilities in Concord, Burlingame, Oakland, San Francisco, San Jose, San Rafael, and Rohnert Park, California, and Las Vegas, Nevada, copies of the attached notice

marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of

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[3]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 31 July 1986

Wilford W. Johansen,
Member

Marshall B. Babson,
Member

James M. Stephens,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

Filed Nov. 5, 1987
Cathy A. Catterson,
Clerk
U.S. Court of
Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TAYLOR MADE OFFICE SYSTEMS, INC.	)	
Petitioner/cross-respondent,	)	Nos. 87-7004; 87-7038
vs.	)	NLRB No. 20-CA-17656
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent/cross-petitioner.	)	MEMORANDUM
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIA	)	
Respondent/intervenor.	)	

Petition for Review from a Decision
and Order of the
National Labor Relations Board

Argued and Submitted September 18, 1987
San Francisco, CA

Before: ALARCON and O'SCANNLAIN, Circuit Judges, and STEPHENS, District Judge*

In appeal No. 87-7004 Taylor Made Office Systems (Taylor Made) claims that the National Labor Relations Board's (the Board) certification of Local 9410 of the Communications Workers of America (the Union) as the bargaining representative for certain classes of Taylor Made employees is invalid because the Board abused its discretion when it failed to hold an evidentiary hearing on one of Taylor Made's objections before certifying the Union in its July 31, 1986 Decision and Order. In appeal No. 87-7038 the Board has applied for enforcement of its July 31, 1986 order requiring Taylor Made

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*Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

to cease and desist from refusing to bargain with the Union and to bargain with the Union on demand. We have jurisdiction under 29 U.S.C. §160(e), (f).

In the objection at issue Taylor Made claimed that it was entitled to an evidentiary hearing because it made out a prima facie case that the Union engaged in misconduct that was sufficiently coercive to justify invalidating the election. NLRB v. Advanced Systems, Inc., 681 F.2d 570, 575, 577 (9th Cir. 1982). We review the Board's denial of an evidentiary hearing on this objection for abuse of discretion. Id. at 572. The sole allegation of coercive conduct at issue is Taylor Made's claim that Bass, an employee, made a threat to Burgess, an employee who voted in the representation election, and that Bass was acting as an agent of the Union. According to Burgess' affidavit, the following exchange occurred

after Burgess asked Bass, a member of the In-Plant Organizing Committee, what would happen if contract negotiations between the Union and Taylor Made failed, the Union called a strike, and the company replaced the striking employees:

> Bass replied, "that's when the shotguns come out." I was surprised at that statement and said something like, "are you serious? Would it really go that far? Would that really happen?" Bass replied that he didn't think that Barry [the owner of Taylor Made] would let it go that far, but if it did, "that's when the shotguns come out."

Burgess' affidavit also discloses that Bass' statements were heard by Burgess alone and that they were "made in a serious manner, and not in a joking way."

Bass' statements are not coercive conduct. Any threat they contain is directed at either management or strike-breakers, not at voters in the election. Because Taylor Made has not made out a

prima facie case of coercive conduct, the Board did not abuse its discretion in failing to hold an evidentiary hearing.

Because no coercive conduct was present in this case, we need not determine whether Bass was acting as an agent of the Union.

The certification of the Union is valid, and the Board's order to bargain is ENFORCED.**

**This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

APPENDIX E

Filed Aug. 30, 1988
Cathy A. Catterson,
Clerk
U.S. Court of
Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TAYLOR MADE OFFICE SYSTEMS, INC.	)	
Petitioner/cross-respondent,	)	Nos. 87-7004; 87-7038
v.	)	NLRB No. 20-CA-17656
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent/cross-petitioner.	)	ORDER
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	)	
Respondent/intervenor.	)	

Petition for Review from a Decision
and Order of the
National Labor Relations Board

Argued and Submitted September 18, 1987
Reheard Junemployee4, 1988
San Francisco, CA

Before: Arthur L. Alarcon, Diarmuid F. O'Scannlain, Circuit Judges, and Albert Lee Stephens, Jr., District Judge*

By Memorandum decision of November 5, 1987, this panel upheld the National Labor Relations Board's (the Board) certification of Local 9410 of the Communication Workers of America (the Union) as the bargaining representative for the bargaining unit and enforced the Board's order that Petitioner/cross-respondent bargain with the Union. We reheard the case on June 14, 1988. Upon reconsideration of the case we reaffirm our original opinion and direct that judgment be reentered.

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*Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

Filed Aug. 30, 1988
Cathy A. Catterson,
Clerk
U.S. Court of
Appeals

Taylor Made Office Systems, Inc. v. NLRB,

Nos. 87-7004/7038

ALARCON, J., dissenting

After rehearing this matter, I am convinced that I erred in concurring in the original disposition, filed November 5, 1987. Accordingly, I withdraw my concurrence and respectfully dissent.

The majority concludes that threats of violence which union representatives direct at future strikebreakers do not as a matter of law constitute sufficient grounds to warrant the setting aside of a representation election. Like the National Labor Relations Board in Home & Ind. Disposal Service, 1983 NLRB Dec. (CCH) par. 15,610, p. 26,647, the Third Circuit in N.L.R.B. v. L & J Equipment Co., Inc., 745 F.2d 224 (3d Cir. 1984),

the Eighth Circuit in N.L.R.B. v. Monark Boat Co., 713 F.2d 355 (8th Cir. 1983), and the Fifth Circuit in Hickory Springs Mfg. Co. v. NLRB, 645 F.2d 506 (5th Cir. Unit A 1981), I believe that this view:

> does not take into account the tendency of such threats to have a substantial and destructive effect on free and open campaign discussion, as well as freedom of choice at the polling place itself. A campaign environment in which a union threatens that violent repercussions will ensue, should employees choose to oppose it in the future, is one in which there is a substantial likelihood that employees will be inhibited from expressing their actual views, and is surely one which jeopardizes the integrity of the election process.

Home & Ind. Disposal Service, 1983 NLRB Dec. (CCH) Par. 15,610, at p. 26649; see Hickory Springs, 645 F.2d at 509-10 (threats by union representatives); see also L & J Equipment, 745 F.2d at 238-39 (threats by union supporters); Monark Boat, 713 F.2d at 358-59 (same). I would adopt the well-reasoned positions of the

NLRB in Home & Ind. Disposal Service, the Third Circuit in L & J Equipment, the Eighth Circuit in Monark Boat, and the Fifth Circuit in Hickory Springs, and hold that threats against future strikebreakers may constitute sufficient grounds to warrant the overturning of a representation election.

With this principle in mind, I turn to the question whether Taylor Made was entitled to an evidentiary hearing on its objections to the representation election. To obtain an evidentiary hearing, an objecting party must "make out a prima facie showing of substantial and material factual issues that would, if true, warrant setting aside the election." Bell Foundry v. N.L.R.B., 827 F.2d 1340, 1344 (9th Cir. 1987). It is an abuse of discretion for the Board to deny an evidentiary hearing when the objecting party has estabished a prima facie case.

Id. ("we must construe the 'well pleaded factual assertions of the objection most favorably to the excepting party,' and will remand to the Board to order a hearing if those factual assertions create a material issue of fact") (quoting NLRB v. Belcor, Inc., 652 F.2d 856, 859 (9th Cir. 1982)); accord N.L.R.B. v. Eskimo Radiator Mfg. Co., 688 F.2d 1315, 1318 (9th Cir. 1982).

To establish a prima facie case that a representation election was tainted by threats made to future strikebreakers, the employer normally must plead facts which, if true, would be sufficient to support a finding both that threats were made and that an "employee was actually coerced or intimidated" by the threats. See Belcor, Inc., 652 F.2d at 861; Spring City Knitting Co. v. NLRB, 647 F.2d 1011, 1019 (9th Cir. 1981). However, where the threats are "inherently intimidating," see

Spring City, 647 F.2d at 1019, their coercive effect is presumed and the employer need only show that the threats were made to be entitled to a hearing, see id.

In the instant case, Taylor Made's objections make out a prima facie case that the representation election was tainted by threats of future violence. Read in a light most favorable to Taylor, Bell- Foundry, 827 F.2d at 1344, the Burgess affidavit provides that union representative Bass threatened to attack future strikebreakers with shotguns. While the affidavit does not disclose whether Burgess was intimidated by this threat, we must presume that he was so because threats of gunplay are inherently intimidating. See Spring City, 647 F.2d at 1019.

Since Taylor Made made out a prima facie case that the representation

election was tainted by the alleged threats, I would hold that the Board abused its discretion in refusing Taylor's request for an evidentiary hearing.

DECLARATION OF SERVICE BY MAIL

I declare that I am a member of the Bar of the United States Supreme Court, and am counsel of record for Petitioner herein. I certify that the within **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**, with **APPENDICES A** through E, has been served pursuant to Rule 28 of the Supreme Court Rules on all parties required to be served, by depositing three true copies thereof in the United States mail, first class postage prepaid, to each such party addressed as follows:

Elliott Moore
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Washington, DC 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 23, 1988 in San Francisco, California.

_____
PAUL B. JOHNSON